IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.3082 OF 2006

Asgar K. Sattar .. Applicant

Versus

The State of Maharashtra .. Respondent

Mr.Vikas Shivarkar for applicant

Mrs.M.M.Deshmukh, A.P.P. for State.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 23rd August 2006.

P.C.

. Heard learned Advocate for applicant and Mrs.Deshmukh, learned A.P.P. for State.

2. Applicant has applied to this Court for

setting aside the order passed by the trial court on 14th July 2006 during the course of trial in sessions case No.35 of 2004.

3. The charge is under sections 375 and 376 of I.P.C. The prosecutrix was admittedly examined by the prosecution and the applicant was to cross examine her. The matter was adjourned to enable him to do so. When the Applicant's advocate did not cross examine, the learned Judge had no choice but to forfeit the right of applicant in that behalf. Later on, applicant's advocate applied for recalling the prosecutrix for cross examination, which application made on 5th January 2006, was admittedly granted subject to payment of Bhatta charges. Applicant did not bother to pay the Bhatta charges and therefore, the learned Judge decided, after giving applicant two opportunities, to proceed with the matter. Learned Judge has recorded statement of the accused and posted the matter for arguments.

4. It is at this stage that the learned Advocate for applicant requests this Court to exercise its inherent powers under section 482 to sub-serve the ends of justice. In his submission, once the application for recalling the prosecutrix was granted, the omission to pay Bhatta charges is not fatal. Assuming that opportunity was given to pay Bhatta charges and the Court could proceed further the applicant should not suffer. Charge being grave and serious in nature, one final opportunity be granted. Applicant undertakes to cross examine the prosecutrix on the date and time determined by this Court and shall not seek any adjournment. Applicant would deposit Bhatta charges within two days from the receipt of ordinary copy duly authenticated of this order.

5. Mrs.Deshmukh on the other hand submits that this is not a fit case for exercise of

inherent powers. The order is interlocutory and it does not suffer from any error apparent nor can it be said to be resulting in miscarriage of justice, soas to enable this Court to exercise its inherent powers. In the facts and circumstances of this case, the learned Judge was justified in refusing to exercise the discretion in favour of the applicant.

6. After perusing the application and the annexures thereto so also hearing Counsel for both sides, I am of the view that there is much substance in the contention of learned A.P.P. that powers of this Court are not meant to be exercised with a view to reward parties for the lapses is conduct of their case. However, in the peculiar facts and circumstances of this case, when the trial court has granted the application to recall the prosecutrix, all that remained was payment of Bhatta charges for which also opportunity was given but payment was not made.

In the light of the undertaking given before me now, the order under challenge is set aside. It is only in the peculiar facts and circumstances of this case and to sub-serve the ends of justice that this order is passed. This order shall not be treated as precedent in future cases.

7. In the light of the above, the order under challenge is set aside and shall stand substituted as below:-

a) Applicant to pay bhatta charges for recalling the prosecutrix for cross examination within a period of two days from the date of receipt of authenticated copy of this order;

b) If the bhatta is paid as above, trial court to allow the applicant to cross examine the prosecutrix in the sessions case and for that purpose, the

matter is posted on 4th September 2006. The applicant shall complete cross examination within two days from the date of appearance of the prosecutrix.

c) Trial court not to proceed with the argument till the Bhatta charges are paid and opportunity is granted to applicant as above.

d) Needless to state that in the event of default in in payment of bhatta charges, the order of trial court would stand and this application would automatically be dismissed without any reference to this Court. Thereupon, the trial court to proceed further with the trial in accordance with law. No order as to costs.

(S.C.Dharmadhikari, J)